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No. 90-899

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

Petitioners,

against

THE RECTOR, WARDEN AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, AND THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for Second Circuit

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February 1, 1991

This reply brief is submitted by petitioners, The Committee To Oppose The Sale Of St. Bartholomew's Church Inc. ("the Committee") and certain members of St. Bartholomew's Church ("the Church"), in support of their certiorari petition.

The respondent Church incorrectly argues at page 2 of its brief that petitioners cannot raise the issue of the failure of the District Court to conduct a trial de novo because they did not appeal that ruling. The record facts demonstrate that petitioners contested that ruling in their motion to intervene, the denial of which was appealed.

On July 10, 1987, in open court, the Church and the City advised the District Court that the parties were prepared to try the case based solely upon the non-judicial record before the Landmarks Preservation Commission.

The proposed intervenors immediately protested the procedure because the Church's case before the Landmarks Preservation Commission was not subjected to cross-examination, the Federal Rules of Evidence or discovery and was not contested by a formal adversary (A 309-310).[1] In response to petitioners' objections, the District Court permitted them to renew their motion to intervene. (A 313) The Court permitted the renewed motion because it was concerned that the proposed intervenors (who had continuously attacked the credibility of the Church's case) were not being adequately represented by the defendants who were prepared to stipulate to a trial on a record which had not been judicially tested. (District Court Transcript of November 20, 1987, pages 27-28).

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[1] References to (A ____) are to pages in the Appendix at the Court of Appeals, Second Circuit.

The renewed motion to intervene was filed on October 30, 1987. (A 313) It specifically urged that the resolution of the constitutional issues required a judicial trial and that intervention should be granted to assure such a trial. (A 313-317)

On November 20, 1987, the District Court stated (at page 19 of the transcript):

> I have already decided that you are not adequately represented. I have already decided that the information you have to give me would be useful to me in resolving the issues left open by my denial of the motion for summary judgment. The only two issues which I haven't decided ... are the issue of whether (a) intervention is appropriate as a matter of right and (b) whether, if intervention as of right is not appropriate, I can entertain a permissive intervention as a matter of discretion without an independent jurisdictional predicate.

The issue of intervention, however, became mooted when, at oral argument held on

December 29, 1987, the Court stated "I plan a trial" (District Court Transcript of December 29, 1987, p. 72, 79), at which the proposed intervenors were to be permitted to participate as amicus curiae.

Accordingly, since the District Court planned to conduct a trial, the motion to intervene was denied. (A 323) Petitioners, to preserve their rights, filed a notice of appeal (A 324), which appeal was subsequently withdrawn, by order of the Second Circuit, without prejudice to renewal at the end of the case.[2]

As a result of the District Court's decision to conduct a trial, the parties, in

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[2] After judgment was rendered against the plaintiff Church, it appealed. Petitioners also appealed the denial of intervention urging that in the event of a reversal, intervention should be granted and the case remanded for a full trial.

cluding petitioners, as amicus curiae, were directed to prepare a pre-trial order. During the course of preparations for trial, and in open court on June 27, 1988, the Court indicated a possible reversal of its earlier position, stating: "A consent trial based upon the administrative record may be what is required". (Transcript of June 27, 1988, p.45).

One month later, on July 27, 1988, the District Court ruled: "I will try the case based upon the administrative record." (Transcript of July 27, 1988, p. 35)

On the subject of a trial de novo, petitioners objections and their motion to intervene, the District Court's opinion states that the parties requested that the trial be conducted solely on the basis of the adminis-

trative record and that "[t]he putative intervenors did not either request or consent to that prccedure" (12b); and that "[i]nitially, the Court was of the view that it could have a trial de novo . . . in deciding whether the landmark laws had been unconstitutionally applied to plaintiff." (12b) The Court continued:

> "Subsequently, the Court reconsidered this view and concluded that it would be inappropriate to predict a finding of unconstitutionality on facts which the Landmark Commission never had opportunity to consider . . . " (12b).

In so ruling, the Court, as requested by the parties and notwithstanding the objections of the petitioners, ruled that it would decide the Church's constitutional claims solely on the basis of the non-judicial administrative record. (12b - 13b).

When the Church appealed the judgment

against it, the proposed intervenors reinstated their appeal from the denial of their motion to intervene, requesting that, in the event of a reversal, their motion to intervene should be granted and the case remanded for a full trial.

In the District Court and in their appeal to the Second Circuit, petitioners fully raised the issue of the propriety of the District Court's ruling that it was required to try the case upon the administrative record and that a trial de novo was not required.

In incorrectly ruling that it was legally compelled to try the case on the basis of the administrative record, the District Court abdicated its responsibility as a Federal Court to exercise its independent judgment upon a judicial record. (See Point I of peti-

tion for certiorari.) The petitioners appealed that decision through the only mechanism available to them, their motion to intervene.

Having ruled that it could not hold a trial de novo, the District Court, in its decision, stated that permissive intervention was denied as a matter of discretion because "intervention would have seriously interfered with the parties' desire to expeditiously resolve the constitutional claims raised on the administrative record." (7 b). The Second Circuit affirmed that holding.

In the Second Circuit, petitioners urged that if "the judgment below is not affirmed, intervention should be permitted and the case should be remanded for a full trial

at which the Church's fact and expert witnesses should be subjected to cross-examination and the proof presented should be subjected to the rules of evidence and where defendants and the intervenors should be permitted to conduct discovery to contest the credibility of the Church's proof." (Pages 5-6 of Appellant's Brief in Second Circuit, Appeal No. 88-775; See also pages 12-15 of said brief and page 10 of Appellant's Reply brief wherein they stated that "intervenors have sought a judicial determination of the constitutional issues raised by the Church based upon a complete judicial record in which the truth would emerge.")

Since the Second Circuit affirmed the District Court's judgment against the Church, the petitioners motion to intervene as well as

their appeal from the denial of intervention was mooted.

Notwithstanding the mooting of petitioners appeal by reason of the affirmance of the judgment against the Church, the Second Circuit ruled that the District Court did not abuse its discretion by denying permissive intervention because it was eminently reasonable for the District Court to conclude "that intervention only would complicate the litigation, and thereby 'unduly delay . . . the adjudication of the rights of the original parties.' Fed. R. Civ. P. 24(b)." (28a).

As argued in the petition for a writ of certiorari, the District Court was required to exercise its independent judgment upon a judicial record to adjudicate the constitutional, as applied, claims of the Church. The

District Court was correct in its initial ruling that it should hold such a trial, notwithstanding the parties desire to expeditiously resolve the controversy based upon the non-judicial administrative record. The District Court thereafter erred when it held that it was legally precluded from conducting a trial de novo and denied intervention to petitioners who urged such a trial. The Second Circuit was wrong in affirming that decision.

In sum, the petitioners, in the District Court, raised the issue of the necessity for a trial de novo to resolve the constitutional issues, sought to intervene to compel such a trial, initially convinced the District Court that a trial de novo must be held, and, when the District Court reversed itself, petitioners perfected the appeal to the Second Circuit of the denial of their motion to intervene to compel a full trial.

Accordingly, the respondent Church's argument that the petitioners did not raise the issue of the failure of the District Court to conduct a trial de novo is totally without merit.

CONCLUSION

For the reasons stated herein and in the petition for certiorari it is respectfully requested that, in the event this Court grants the petition for certiorari of the Church, this petition should also be granted.

Respectfully submitted,

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Dated: New York, New York
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